

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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RISEBORO COMMUNITY
PARTNERSHIP, INC.,

Plaintiff,

-against-

SUNAMERICA HOUSING FUND NO.
682, et al.,

Defendants.

: 18-CV-07261 (RJD)
:
: United States Courthouse
: Brooklyn, New York
:
: Tuesday, November 26, 2019
: 11:00 a.m.
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TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE
BEFORE THE HONORABLE RAYMOND J. DEARIE
UNITED STATES SENIOR DISTRICT JUDGE

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Proceedings

3

1 (In open court.)

2 THE COURTROOM DEPUTY: All rise.

3 (Judge RAYMOND J. DEARIE entered the courtroom.)

4 THE COURTROOM DEPUTY: I am going to ask the
5 attorneys please to come up to the podium.

6 We are on this morning for a pre-motion conference.
7 This is Riseboro Community versus SunAmerica Housing, Docket
8 Number 18-CIV-7261, assigned to Judge Dearie and Magistrate
9 Judge Scanlon.

10 Can I ask the attorneys please to note their
11 appearance, beginning with counsel for plaintiff?

12 Why don't you come up here. Thank you.

13 MR. GOLDSTEIN: David Goldstein from Goldstein Hall,
14 PLLC, 80 Broad Street, Suite 303, New York, New York 10004.

15 THE COURT: Welcome.

16 MR. GOLDSTEIN: Thank you, Your Honor.

17 MR. DOLAN: Good morning, Your Honor. My name is
18 Louis Dolan. Nice to see you again. I represent to
19 SunAmerica Housing Fund No. 681 and SLP Housing, I, LLC. I'm
20 with the law firm of Nixon Peabody from Washington, D.C.

21 And Your Honor has graciously granted my ability to
22 appear in this matter on a pro hac vice motion. Thank you.

23 THE COURT: You're welcome. I would have granted
24 your appearance to appear by telephone too, but it is nice to
25 see you in person.

Proceedings

4

1 MR. DOLAN: I understand that, Your Honor, that that
2 was one of my options, and I appreciate the opportunity to
3 appear in person.

4 MR. GOLDSTEIN: Your Honor, if I may just be heard.

5 THE COURT: Let the lady introduce herself.

6 MR. GOLDSTEIN: Oh, I'm sorry.

7 MS. NACE: Good afternoon, Your Honor. My name is
8 Shelby Nace on behalf of defendant SunAmerica and SLP Housing
9 with Nixon Peabody, the New York office.

10 THE COURT: Yes, sir.

11 MR. GOLDSTEIN: Yes, I'm sorry, Your Honor.

12 My partner Brian Markowitz, who is the lead counsel
13 on this, is not here right now. I am just merely here as a --

14 THE COURT: So you are stuck.

15 MR. GOLDSTEIN: I am kind of stuck. I wanted to see
16 if I could reach him, if that's possible. If I could get five
17 minutes. My cell phone is downstairs.

18 THE COURT: Your cell phone is downstairs?

19 MR. GOLDSTEIN: Yes. I haven't been in federal
20 court in about 15 years, Your Honor. I don't -- I'm a
21 transactional attorney. I don't litigate. So I don't have
22 the standard attorney ID to appear in court. I apologize
23 about that.

24 THE COURT: It's all right.

25 THE COURTROOM DEPUTY: Sir, if you give me --

Proceedings

5

1 THE COURT: Did you expect to have him here?

2 MR. GOLDSTEIN: Yes. He was supposed to be here,
3 yes.

4 THE COURT: Where are you going, Ellie?

5 THE COURTROOM DEPUTY: I am going to get his phone
6 so he can call his partner.

7 MR. GOLDSTEIN: Just to find out what happened. I
8 apologize, Your Honor. I could attempt to argue.

9 THE COURT: I was about to apologize to you folks
10 for getting on the bench two minutes late because I generally
11 am very prompt.

12 Well, we will give him a few minutes. I have got to
13 get moving, I have another matter.

14 To me, looking at these papers, there is one
15 fundamental question that dominates the scene here. I don't
16 know about malicious interference with contractual relations,
17 I mean that seems like a bunch of nonsense to me, frankly.
18 That is not a ruling. Somebody has a view as to the
19 interpretation of a contract, brings a lawsuit seeking a
20 declaration. That, to me, does not add up to malicious
21 interference. But what dominates here is this so-called right
22 of first refusal.

23 Once that issue is resolved, this case is going to
24 resolve itself, right?

25 MR. GOLDSTEIN: That is correct.

Proceedings

6

1 THE COURT: So why don't we just simply limit
2 ourselves, let's brief that question and get it resolved.

3 Does that make sense?

4 MR. DOLAN: Yes, Your Honor.

5 THE COURT: We are making progress here. I don't
6 want to get you in Dutch with your partner, but there is not
7 much to talk about.

8 What is the authority, we had this discussion once
9 before, what is the authority for abandoning the express
10 language of the contract in favor of a discussion as to the
11 motivations behind these transactions, tax-wise, et cetera?

12 I mean fundamental contract interpretation, unless I
13 am missing something, is you take the language. If it's clear
14 on its face, that is the end of it. That is sort of where I
15 am coming out here.

16 MR. DOLAN: From the defendants' point of view, we
17 agree with Your Honor.

18 THE COURT: I am shocked to hear that.

19 MR. DOLAN: And that position, of course, is
20 supported also by the language of the contract, which says
21 that 1605 is the fully integrated agreement and memorializes
22 the agreement of the parties, to the exclusion of any other
23 understandings or materials, unless they form a part of this
24 contract. And they simply do not.

25 MR. GOLDSTEIN: So, Your Honor, granted I'm not a

Proceedings

7

1 litigator, but I am familiar enough with the case.

2 We tend to disagree here. This is -- Low Income
3 Housing Tax Credit Program is a special program which is
4 regulated here, in this case, by the New York State agency
5 that oversees it. We are talking about significant subsidy
6 dollars and federal tax relief that the investor got, which
7 is -- which is under the tax code, itself. This program was
8 formed under Section 42.

9 THE COURT: I understand all of that.

10 MR. GOLDSTEIN: Right.

11 THE COURT: In fact, I have a little familiarity
12 with it. Not as much as you, I know a little bit about the
13 program. But so what?

14 MR. GOLDSTEIN: So, Your Honor --

15 THE COURT: Why didn't you write it differently?

16 MR. GOLDSTEIN: Well, firstly, we weren't counsel
17 then.

18 THE COURT: Good.

19 MR. GOLDSTEIN: Right, so we would have written it
20 differently.

21 The contract, itself, is not the standard language
22 that you would see in today's partnership agreements. This
23 was an earlier agreement. I'm not sure why it was drafted in
24 such a, to me, not following what the code would presume to
25 state, but the intent of the parties is it is important here

Proceedings

8

1 because the state wants it to be maintained as affordable low
2 income housing. The investor here does not. The investor is
3 taking a position which is contrary to the purpose of the
4 statute. They get ten years of deductions, tax deductions.
5 Then at the end of the compliance period, 15 years, they are
6 supposed to exit for a nominal amount.

7 THE COURT: Maybe that is your partner texting you
8 that he is stuck.

9 MR. GOLDSTEIN: Yes, probably. For a nominal
10 amount. And what --

11 THE COURT: You would agree that on its face it
12 seems pretty clear, nothing ambiguous about the language,
13 right, of first refusal? We all know what that is.

14 MR. GOLDSTEIN: Well, Your Honor, they're not
15 letting our client exercise the right to take -- to have the
16 option to take the project.

17 So their position is contrary --

18 THE COURT: And his response is going to be your
19 client did not contract for that right, your client contracted
20 for a right of first refusal.

21 I don't want to take advantage of you. You seem to
22 be perfectly competent on the subject, to be honest.

23 Any idea where your colleague is?

24 MR. GOLDSTEIN: Yes, I am going to take a look right
25 now, sorry, Your Honor. I didn't want to be rude.

Proceedings

9

1 THE COURT: You know, I do have a feeling somehow I
2 am missing something, to be candid, but I can't get past this
3 language.

4 MR. GOLDSTEIN: He seems to be stuck, Your Honor, I
5 apologize.

6 THE COURT: He's stuck?

7 MR. GOLDSTEIN: Yes.

8 THE COURT: Stuck where?

9 MR. GOLDSTEIN: In court, in Supreme Court, New York
10 State Supreme.

11 THE COURT: So we are waiting for Godot, I see.
12 Okay.

13 MR. GOLDSTEIN: But, Your Honor, I think what's
14 important here is that the -- you have to look at the totality
15 of the situation. There is a regula -- state regulatory
16 agreement, which talks about that this project is supposed to
17 be maintained as affordable housing with the intent that our
18 client, Riseboro Community Partnership, a non-profit
19 developer, is supposed to be able to own the project, at the
20 end of the day maintain it as affordable housing.

21 SunAmerica's position, basically, thwarts that
22 attempt to do that. Their position is that no, you can't do
23 that under the basis of this agreement and under the statute.
24 But that flies in the face of -- in contrary to the whole
25 entire purpose of the program. And by doing that, this sends

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Proceedings

10

1 a message, a chilling effect actually, through the whole
2 entire tax credit community that non-profits are not going to
3 have the rights that they're supposed to have to be able to
4 take the investor out for a dollar. And if that happens, this
5 throws the whole entire program into chaos. That's not what
6 is intended by the program, the state here, in New York State.

7 THE COURT: I understand.

8 MR. GOLDSTEIN: And that's a really chilling effect
9 on affordable housing.

10 THE COURT: I understand what you're saying, but I
11 keep getting stuck on this schoolboy adage of take the
12 language as you find it.

13 Anything you want to add to your position, other
14 than you're glad you made the trip?

15 MR. DOLAN: Other than -- other than we agree with
16 Your Honor.

17 I mean, the position made by the plaintiff is that
18 the state has a certain desire or certain intent. Right, the
19 state is not a party to this contract. Right?

20 The state does have a regulatory agreement that
21 preserves this property as affordable housing property for a
22 substantial period of time after the expiration of what we
23 call the initial compliance period. So the state's interest
24 is well protected.

25 THE COURT: For how long?

Proceedings

11

1 MR. DOLAN: In this particular case, it's probably
2 at least another 15 years. Current deals are probably a total
3 of 30 to 45 years where the property in New York State is
4 required to be an affordable property; right. That is part of
5 the consideration that is given to the state in exchange for
6 an allocation of the credits, just speaking in general.

7 And so typically what happens in these deals is that
8 there is what's called an Extended Use Agreement that is
9 recorded among the land records. It runs with title. And it
10 restricts and prohibits the use of the property for anything
11 other than low income or affordable housing, right, in
12 accordance with the desires of the state for a substantial
13 period in excess of the original 15-year period.

14 So that is the instrument that is out there that is
15 expressly designed to protect and effect the rights that the
16 plaintiff says the state has in this project and in this
17 interest.

18 They know how to protect themselves. The parties to
19 the contract knew how to contract. They elected to contract
20 for a right of first refusal. As a matter of tax law, they
21 could not have contracted for a below-market price option,
22 right, because that would have defeated the tax benefits.
23 Right? And, in fact --

24 THE COURT: The incentive for you folks is the tax
25 benefit?

1 MR. DOLAN: That's one, but there are other
2 incentives as well. Partly they obtain some cash flow from
3 the property just through normal operations, collecting rents
4 and so forth. They, in some instances, collect additional tax
5 benefits. For example: Deductions, depreciation,
6 amortization, things like that. And also, they are entitled
7 as business people to realize, if it happens, as sometimes it
8 does in these projects, appreciation in the value of the
9 underlying real estate. That is not always the case. There
10 are plenty of these projects in other parts of the country
11 typically that do not appreciate as we see in the New York
12 City market, but those are all sort of a basket and bundle of
13 benefits that people who invest in these deals expect to have
14 for a period of time.

15 There is absolutely nothing that prohibited these
16 parties when they contracted from contracting for an option at
17 fair market value, right, not below fair market value, but at
18 fair market value. So that the plaintiff here would have the
19 absolutely right to come in and purchase the property, not at
20 the beneficial price that it would like to be able to buy it
21 for now. They could have contracted for that. They knew how
22 to do that. They didn't.

23 Similarly, Your Honor, what I would say is Congress
24 knew very well how to use the word "option" in the 42(i)(7)
25 legislation when that was adopted back in the 1980's. And, in

1 fact, the very paper cited by my colleague at the bar here to
2 this Court indicates that in the 1980's Congress specifically
3 considered adoption of the word "option" "at the same time
4 they were considering adoption of the words "right of first
5 refusal," and they rejected the use of the term "option."
6 Right, and so that is a matter of the legislative history.
7 There is no particular discovery that is required on that.

8 We can provide you with a copy of that particular
9 bill, which found its way to the Senate floor and was not
10 acted on in favor of the right of first refusal.

11 And in addition, the current legislative history is
12 such that Congress is currently considering a bill known as
13 the Cantwell-Hatch bill, which would have the effect, at least
14 in part, of changing the "right of first refusal" language
15 that exists in the code to "option." Right? But they have
16 not enacted that, right, and Congress is not about the
17 business of going through frivolous activities changing words.

18 At least in this respect I would say, Your Honor,
19 perhaps that remark was a bit too broad, I apologize, but at
20 least in this respect: If Congress thinks that there may need
21 to be a change, right, they are going to change the
22 legislation for a particular reason or to satisfy a particular
23 result, and so it is patently apparent that Congress knew what
24 it was doing when it adopted right-of-first-refusal language
25 in 42(i)(7). It rejected the term "option" within that

1 context, and currently is considering the possibility of now
2 changing that language that's in the code to "option." All of
3 which completely supports Your Honor's position, I think,
4 which is this language is right-of-first-refusal language.
5 That is a special instrument recognized in the law. It has
6 been for years and years and years. It has a special meaning
7 under the law. And when Congress determined and decided to
8 adopt that language in 42(i)(7), it took with it, right, all
9 of the common law that was associated with that concept and
10 did not ask, for example, this Court to create a new body of
11 federal law around that concept because there was already
12 state law in every jurisdiction in the country, frankly, that
13 tells practitioners and business people what a right of first
14 refusal is in that jurisdiction."

15 MR. GOLDSTEIN: Your Honor, I, obviously, disagree,
16 respectfully disagree.

17 THE COURT: Well, you don't disagree on one thing,
18 the object here, the objective here --

19 MR. GOLDSTEIN: Yes.

20 THE COURT: -- is to provide low income housing.

21 MR. GOLDSTEIN: That is absolutely correct.

22 THE COURT: And there is nothing about the
23 instruments, and I am not ruling on this, I am just giving you
24 my reaction. As I see it, there is nothing about the
25 instruments, if counsel is correct, that undermines that goal.

Proceedings

15

1 MR. GOLDSTEIN: But, Your Honor, I would disagree
2 because I think the interpretation that counsel is taking is
3 that, yes, no one really truly understands why Congress didn't
4 do "option." I don't know whether it was the more politically
5 correct thing at the time to do "right of first refusal."

6 If we go back to the beginning of the statute, that
7 was added after the statute was enacted in '86, because there
8 were many amendments. There were two amendments after '86
9 when the statute was created. And I think to create -- clean
10 up the gaps, because the states wanted to make sure that these
11 projects were -- primarily in the beginning were going to
12 non-profit organizations and they wanted to maintain
13 affordable housing.

14 So I think a compromise is what happens because the
15 way the right of first refusal is written in the statute, it
16 talks about a below-market price. But how is that a true
17 right of first refusal? It's not talking about fair market
18 value, it talks about there's -- you're able to obtain the
19 property for a dollar, assumption of the debt and paying any
20 of the investors' exit taxes. That's not fair market.

21 And what the investor here wants to do is create a
22 fair market value, which cannot be supported in these
23 projects. These projects are below-market rents. They --
24 many of them have long-term regulatory agreements. But the
25 belief here, and which I believes really is driving the

Proceedings

16

1 defendants' cause here, is that just happens that this
2 building is in an area of Brooklyn which is appreciating in
3 great value. At the time, over 15 years ago, it was not such
4 a good neighborhood. But investor --

5 THE COURT: Where is it again?

6 MR. GOLDSTEIN: It's in the Ridgewood/Bushwick area
7 of Brooklyn.

8 THE COURT: I can't believe my daughter lives in
9 Bushwick.

10 MR. GOLDSTEIN: Right.

11 THE COURT: When I was a young prosecutor Bushwick
12 was sort of action central.

13 MR. GOLDSTEIN: Right.

14 So, Your Honor, a lot of these investors see
15 opportunity. New York City, 15, 20 years ago, besides outside
16 of Manhattan, was not extremely valuable property. Who knew
17 today Brooklyn would be sitting on a gold mine?

18 (Mr. Markowitz entered the courtroom.)

19 MR. GOLDSTEIN: And so the investor, when they say
20 they're a long-term holder of assets, that's not the intent of
21 the program, for the investor to be a long-term holder of
22 assets. It's the intent of the non-profit to get the property
23 at a below market. Yes, they did not use of the word
24 "option," but the right of first refusal, in essence, is an
25 option here and our client is exercising that right.

Proceedings

17

1 THE COURT: Mr. Goldstein has, in your absence,
2 conceded the point and we've settled the case.

3 MR. MARKOWITZ: Your Honor, I apologize.

4 THE COURT: At least, we got a smile out of you.

5 MR. MARKOWITZ: I apologize, Your Honor. We had a
6 case in Supreme Court that could not be moved and the person
7 who was supposed to handle it got called into the Bronx on
8 another case that could not be moved. So, I apologize.

9 THE COURT: That's okay.

10 Well, we have just been having sort of an informal
11 back-and-forth here. I think we've reached, at least, this
12 common understanding, that this case is driven by the question
13 of how one reads the right of first refusal as articulated in
14 the contract.

15 And even though Mr. Goldstein tells me he is not a
16 seasoned litigator, he has done a pretty good job stating your
17 position --

18 MR. MARKOWITZ: I had not --

19 THE COURT: -- which I had, frankly, some difficulty
20 with. But I think we ought to focus on that question, get it
21 resolved, and see where that gets us.

22 MR. MARKOWITZ: On the question of how to exercise
23 the right of first refusal?

24 MR. GOLDSTEIN: Yes.

25 MR. MARKOWITZ: Okay.

1 So that question is actually a question that
2 wouldn't -- it's not -- while that is one of the major
3 questions in this case, it's not the question that's ready for
4 summary judgment at this point. And that's the issue that we
5 took exception with in their letter, which was against our
6 request for the motion to dismiss.

7 Okay, the reason that their question about the
8 motion for summary judgment is not ready, there is many issues
9 here regarding what -- how this right of first refusal and
10 what the parties agreed to and what they understood at the
11 inception of the contract.

12 THE COURT: Let me stop you, and I will give you
13 back the floor.

14 But fundamentally, contract interpretation, we start
15 with the language. Right? Contracts are Contracts 101. I
16 can see David Garland preaching that gospel to me a thousand
17 years ago. We start with the language. Right?

18 Is there anything ambiguous about that language?

19 MR. MARKOWITZ: Yes, that's the issue.

20 THE COURT: Well, if I were to agree with you, then
21 maybe we do, maybe summary judgment isn't.

22 My inclination is you're wrong, but that is not a
23 ruling, that is just my reaction to what I have read in your
24 letters and the text of the contract.

25 MR. MARKOWITZ: As we said, or as Your Honor

1 correctly pointed out the last time we were here before you on
2 the motion for remand, their interpretation of the contract,
3 which would have the right of first refusal only exercisable
4 upon this bona fide offer that they had the sole power to
5 reject or accept, would leave the contract provision
6 meaningless. It would never be exercised because underlying
7 the right of first refusal, and what's not present in any one
8 of the New York cases that are out there or to which they've
9 cited, is the fact that the underlying purchase price, the
10 exercise price of that right of first refusal is an extremely
11 below market number of the assumption of the debt, plus a
12 nominal fee, and potentially some exit taxes. Okay?

13 As Your Honor correctly pointed out the last time we
14 were here, no bona fide purchaser is going to come in here,
15 spend the time for an appraisal, spend the money for an
16 appraisal, spend the time and money to put together an offer,
17 make the offer, only to get it rejected; or even if it's not
18 rejected, to have it surpassed by this extremely below market
19 number, which they can never -- a bona fide purchaser would
20 never have been able to attain.

21 As of that, that by itself means that this New York
22 law on right of first refusal that they are relying so heavily
23 on, despite the fact that they're the ones who said this was a
24 federal question and should be done under the federal law,
25 which is the interpretation of how Section 42 is, now they

Proceedings

20

1 want to revert back to New York law, but that being said, none
2 of those -- those cases deal with what -- the issue here,
3 which is what we have, this interest, which as I heard my
4 partner talking is, in essence, operates as an option, but as
5 that number is so low, there can never be a bona fide offer.

6 Also Contract 101, as I learned it, you know, with
7 Professor Crea, was that we had to come in and you cannot have
8 a piece of a contract be meaningless. You have to interpret
9 the words of the contract so that it actually has meaning and
10 intent.

11 If you -- if we agree with their position under the
12 New York law that this is a common law, regular, ordinary,
13 garden variety right of first refusal, then that means that
14 that entire provision has no meaning, has no intent, it can
15 never be exercised. And that is not what the Section 42 ROFR
16 was about. That's not what the parties intended when they
17 entered into this agreement. That's not what the agencies
18 intended when they extended millions of dollars of loans to
19 the project. That's not what they agreed to when they took
20 their millions of -- tens of millions of dollars' worth of tax
21 credits as part of this.

22 THE COURT: Okay, I see your point, but I suggest
23 that we, in my view, turn to the head question. Let's brief
24 it. If I somehow come to believe that we are premature in
25 addressing it at this point, then we will move on to

Proceedings

21

1 discovery.

2 Where are you on discovery?

3 MR. DOLAN: Your Honor, the defendants, we -- the
4 parties are under court order to initiate discovery.

5 THE COURT: In other words, no place.

6 MR. DOLAN: Strictly in compliance with that court
7 order, we have served initial disclosures and initial sets of
8 discovery because we wanted to comply and to be in compliance
9 with the court order. We are certainly happy to hold those
10 materials in abeyance. I don't think they are necessary,
11 but --

12 THE COURT: Let me stop you a second.

13 What about this point: Read as a standard garden
14 variety right of first refusal, your colleague here argues it
15 renders, essentially, the agreement meaningless.

16 Do I paraphrase you awkwardly, Counsel?

17 MR. MARKOWITZ: No, that's pretty much the point.

18 MR. DOLAN: That is fundamentally incorrect. It may
19 not have every meaning in the book that they want it to have,
20 right, but there are any number of circumstances. In fact,
21 the circumstance in the very case that they rely on, right,
22 which is the HRI decision out of Massachusetts, the facts of
23 that case are exactly what Mr. Markowitz told you could never
24 happen because there was, in fact, a third-party offer that
25 was advanced in that specific case.

1 Now, this case is different, in that the plaintiffs
2 here have not bothered to get an offer at all. Whether it's a
3 bona fide offer, an offer for \$10, right, a good faith offer,
4 none of that. They have simply said that this language,
5 right, in 42(i)(7) excuses that.

6 There are any number of rights of first refusal --

7 THE COURT: I get you. I get your point.

8 MR. MARKOWITZ: Your Honor, if I may just respond to
9 that briefly.

10 THE COURT: I guess we are not going to need
11 argument after this.

12 MR. MARKOWITZ: In the Homeowners Rehab case that he
13 just cited, the issue there was specifically, the
14 right-of-first-refusal language specifically and explicitly
15 required an offer. Don't have that here.

16 THE COURT: Well, he is going to say when you say
17 right of first refusal, that, if not explicitly, certainly
18 implicitly with a capital I requires some third-party offer.

19 All right, we are not going to resolve it now. You
20 know where I am thinking. Let's brief that question and go
21 from there. Let's brief that question. There's other stuff,
22 motions to dismiss that I recall. Let's brief that question
23 and we will see where we come out. The case could readily
24 resolve itself, it seems to me.

25 And if you think I am wrong, tell me. Now is the

Proceedings

23

1 time. Now is the time.

2 MR. MARKOWITZ: Well, I think the problem is, is
3 that in order to properly brief it, there needs to be
4 depositions of parties --

5 THE COURT: You are dying to get behind that
6 language, aren't you?

7 MR. MARKOWITZ: You know, there has to be
8 depositions on what the parties intended when they entered
9 into the contract.

10 THE COURT: Well --

11 MR. DOLAN: And, Your Honor, on that point I would
12 just, again, refer the Court back to Section 1605 of the
13 Partnership Agreement, which says specifically: This
14 agreement sets for the --

15 THE COURT: Understood. I understand your point.

16 Well, I cannot tell him not to file a motion on
17 this, but I think it makes sense to address this question.
18 And if I eventually agree with you that somehow we get past
19 this language, then the intent of the parties becomes quite
20 relevant, of course.

21 So let's do that.

22 MR. DOLAN: Thank you, Your Honor.

23 THE COURT: Let's do that, and do it in a streamline
24 fashion so we get this case moving.

25 Who is the Magistrate?

Proceedings

24

1 MR. MARKOWITZ: Judge Scanlon.

2 MR. DOLAN: Judge Scanlon.

3 THE COURT: Judge Scanlon, okay.

4 MR. DOLAN: We are to appear in front of her at
5 12:45 this afternoon.

6 THE COURT: Today?

7 MR. DOLAN: Yes, unless you can assist us with that.

8 THE COURT: I will try. I don't know what her
9 calendar is, but I will try.

10 MR. MARKOWITZ: I believe her original intent, if
11 you remember correctly, when we were before her the first time
12 there was -- she'd actually asked us for -- we put down for a
13 telephone conference regarding whether there should be a
14 motion for summary judgment early in the case or not.

15 And after filing all these letter requests, she
16 turned that into a in-person conference, but I don't know if
17 she realized that we were in front of you in that same morning
18 on the same issue. So I'm not even sure if it was necessary.

19 THE COURT: I assume you can agree on a briefing
20 schedule?

21 MR. MARKOWITZ: Yes.

22 MR. DOLAN: Yes, of course.

23 THE COURT: Why don't you do that, and let me go
24 place a phone call and see if I can get you in there and I
25 will come back.

Proceedings

25

1 MR. MARKOWITZ: Your Honor, if I could just ask you
2 one question?

3 THE COURT: Sure.

4 MR. MARKOWITZ: I just want to know exactly the
5 narrow issue. I just want to be clear on the narrow issue
6 that we are briefing, and I just want to be clear on that.

7 THE COURT: The narrow issue is the interpretation
8 of the right of first refusal.

9 MR. MARKOWITZ: Okay.

10 THE COURT: Is it anything other than a right of
11 first refusal in the classic sense, if you will.

12 I will get ahold of Judge Scanlon and we'll come
13 back.

14 MR. DOLAN: Thank you, Your Honor.

15 MR. MARKOWITZ: Thank you, Your Honor.

16 (Judge RAYMOND J. DEARIE exited the courtroom.)

17 (Recess taken.)

18 (Judge RAYMOND J. DEARIE entered the courtroom.)

19 (In open court.)

20 THE COURT: I called and, of course, got voicemail,
21 which means they are in court, I assume. So I am going to
22 suggest you go there, 13A South. In other words, upstairs.

23 We surrendered the upper floors to the magistrates,
24 so the architect would have some latitude to design the
25 building. One of the great acts of generosity of my

Proceedings

26

1 colleagues. And I will continue to try to get ahold of her.

2 MR. MARKOWITZ: Okay.

3 THE COURT: Go in, sit yourself down, and if you can
4 get the deputy's attention, explain that I had called and,
5 perhaps, she will call me. Otherwise, we will get somebody
6 over there to try to intervene so you can get on her calendar.

7 Have you come up with a schedule?

8 MR. MARKOWITZ: Yes, we have, Your Honor.

9 We've come up with that on January 17th parties will
10 submit motions -- briefs to each other on the issue, that
11 opposition briefs will be submitted to each other and then to
12 the Court on February 14th, and there will be no replies.

13 THE COURT: Okay. Now, you want to argue this, I
14 bet?

15 MR. MARKOWITZ: Yes.

16 MR. DOLAN: Yes.

17 THE COURT: Again.

18 MR. GOLDSTEIN: I'll practice next time, Your Honor.

19 THE COURT: You are doing fine. You are doing just
20 fine. Not a problem.

21 All right, so the briefing will be to me when?

22 MR. MARKOWITZ: We will exchange on the 14th, which
23 is a Friday. I am assuming we can hand-deliver --

24 MR. DOLAN: The 17th.

25 MR. MARKOWITZ: -- it by that Monday, the 17th.

Proceedings

27

1 THE COURT: The 17th of?

2 MR. MARKOWITZ: February.

3 MS. NACE: That's a holiday. It's Presidents' Day.

4 MR. MARKOWITZ: Presidents' Day. So by the 18th
5 we'll have it --

6 THE COURT: So the 18th of February you will file.
7 That will get us into -- I am going to be away then. So I
8 will get three weeks with the papers. Let's put this down for
9 the 20th. Is that okay?

10 Wait a minute, you said 18th of February.

11 MR. MARKOWITZ: February 18th we will have it to
12 you.

13 THE COURT: I beg your pardon. I beg your pardon.
14 Yes, it is going to be the 20th of March, I'm afraid.

15 MR. MARKOWITZ: Okay.

16 THE COURT: I take it, 11:00 a.m. work?

17 MR. DOLAN: Yes, Your Honor.

18 MR. MARKOWITZ: Sure, Your Honor.

19 THE COURT: 11:00 a.m. on the 20th of March.

20 MR. DOLAN: As long as Mr. Markowitz is not in state
21 court.

22 MR. MARKOWITZ: As of now, I'm not.

23 THE COURT: Well, as he has learned today, we don't
24 wait for him.

25 All right, gentlemen and madam, thank you for your

Proceedings

28

1 time and we will see you in the spring.

2 MR. DOLAN: Thank you, Your Honor.

3 MR. GOLDSTEIN: Thank you, Your Honor.

4 MR. MARKOWITZ: Thank you, Your Honor.

5 MS. NACE: Thank you, Your Honor.

6 MR. DOLAN: Best wishes for the holiday.

7 THE COURT: Good luck.

8 MR. DOLAN: Thank you.

9 (Matter adjourned.)

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14 I certify that the foregoing is a correct transcript from the
15 record of proceedings in the above-entitled matter.

16

/s/ Stacy A. Mace

November 26, 2019

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STACY A. MACE

DATE

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